



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-255

In the matter of:
PENN CENTRAL
TRANSPORTATION COMPANY,
Debtor.

THE PITTSBURGH, YOUNGSTOWN &
ASHTABULA RAILWAY COMPANY,
Secondary Debtor.

SUTHERLAND MARINE COMPANY,
Petitioner.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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Attorney for Petitioner
Sutherland Marine Company



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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 21, 1978.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania did not issue an opinion in deciding this matter. It appears that that court must

have relied on its previous opinion in the matter of PENN CENTRAL TRANSPORTATION COMPANY, Debtor, THE CLEVELAND & PITTSBURGH RAILROAD COMPANY, Secondary Debtor, dated October 13, 1976. A copy of said opinion is appended to this petition at p. 7.

No opinion was rendered by the Court of Appeals for the Third Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 21, 1978. Petitioner's application for rehearing in banc was denied on July 11, 1978. Copies of said orders are appended to this petition at pp. 10-12.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The questions presented are:

QUESTIONS PRESENTED

1. Is a trustee in bankruptcy who conducts a private sale of property from the bankrupt estate, and who receives a confirmed offer substantially in excess of the appraised value of the property, under a duty to recommend the sale to the bankruptcy court, when he, the trustee, has no other similar offer before him.
2. Is a District Court, sitting in bankruptcy, required to provide a hearing to a competing, earlier bidder who requests such a hearing, when the court is considering a petition to sell property to a later bidder.
3. Have the trustee in bankruptcy and the lower courts in this case acted in the best interests of the bankrupt estate.

STATEMENT OF THE CASE

Jurisdiction in the court of first instance — the District Court for the Eastern District of Pennsylvania — was from Section 77 of the Bankruptcy Act, 11 U.S.C. §205.

This matter began with the petition of the Trustees in Bankruptcy of the Penn Central Transportation Company for authority to sell a parcel of land to a combination of two bidders. A competing, earlier bidder — the petitioner — objected to the petition and filed an answer requesting a hearing. The district court, without the requested hearing, granted the petition and approved the sale as requested in the petition. The basic facts leading up to the Trustees' petition are as follows:

1. The property in question was appraised on August 28, 1975 at \$349,300.00. This appraisal was revised on August 17, 1976 to \$354,740.00.
2. During the period September 4, 1974 to July 8, 1976, three prospective purchasers were dicker-ing with the trustees to buy portions of the property at private sale:
 - a. Ashtabula Yacht Club indicated an interest in buying approximately 10.6 acres which it leases.
 - b. Kister Construction Company indicated an interest in buying the remainder of the property not sold to Ashtabula Yacht Club.
 - c. Sutherland Marine Co. — the petitioner — indicated an interest in buying approximately 5.5 acres which it leases.
3. On July 8, 1976 Sutherland made a firm offer of \$454,000.00 cash for all of the property.

4. Instead of forwarding this offer to the district court for approval, the trustees set up a purported bidding procedure as follows:

Ashtabula Yacht Club and Kister were notified that they could now submit a joint bid. The parties were notified that sealed bids for the property would be received until August 31, 1976. Sutherland was told that the joint bid would be opened first, and if it did not exceed \$454,000.00 Sutherland would get the property at that figure. If the joint bid exceeded \$454,000.00 Sutherland's bid would then be opened.

5. Sutherland did not submit a further bid.
6. The joint bid was \$465,500.00 which the trustees accepted. The lower court approved this bid without having a hearing on the adequacy of the earlier Sutherland bid, even though Sutherland requested such a hearing. The Court of Appeals for the Third Circuit affirmed the action of the district court without oral argument and without rendering an opinion.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed primarily because of the case from which it arises. Financially, the aggregate sales of property from the Penn Central estate will constitute the largest amount ever involved in a bankruptcy proceeding. It is imperative that the procedures adopted by the trustees and supervised by the district court be strictly according to precedent in bankruptcy cases, and have both the appearance and substance of being above reproach. It is submitted that no fair-minded person could read the limited

record in this case without concluding that for some reason Kister and Ashtabula Yacht Club were favored over Sutherland.

If the reputation of the Trustees becomes that certain insiders are favored in sales of property from the estate, while bona fide offers are given short shrift, the estate will suffer. This Court stated the American rule early on, in the case of *Graffam v. Burgess*, (1886) 117 U. S. 180, at p. 191, that such a procedure tends to diminish confidence in judicial sales, keeps bidders from participating, and diminishes the amounts realized from sales.

The necessity of reviewing the decision below becomes more important because the Third Circuit Court of Appeals, which has been a bell-weather in its protection of bidders at judicial sales, appears to have abandoned its traditional approach. That Circuit decided and has consistently followed the case of *In re. Stanley Engineering Corporation*, 164 F. 2d 316; certiorari denied under name of *Root v. Galman*, 332 U. S. 847. The *Stanley Engineering* case upheld the rights of a high bidder at a judicial sale even though subsequent higher bids were received by the district court at a confirmation hearing. The Third Circuit was followed by the Seventh Circuit in the case of *In re. Marathon Foundry & Machine Company*, 239 F. 2d 122; certiorari denied 353 U. S. 912; and by the Tenth Circuit in the case of *Smith v. Save-Rite Drug Stores*, 178 F. 2d 507.

It is the Third Circuit which supervises the district court and the trustees in their administration of the Penn Central estate. It is submitted that if that court is to abandon its traditional approach to sales from the estate, it should do so only after a full record has been

made and in the form of an opinion stating its reasons for doing so.

The petitioner is aware that in its present posture this case involves an inadequate record below; questions of fact; and a review of the discretion exercised by the trustees and the district court. All of those factors constitute hornbook reasons for this Court to refuse jurisdiction. It is submitted that certiorari should be issued here, if only for the purpose of remanding to the lower court with instructions to hold the hearing originally requested by the petitioner and to make a proper record.

Respectfully submitted,
 JOSEPH S. GILL
 100 East Broad Street
 Columbus, Ohio 43215
 (614) 227-2357
Attorney for Petitioner
 Sutherland Marine Company

MEMORANDUM AND ORDER (10/13/76)
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

In the Matter of
 PENN CENTRAL
 TRANSPORTATION COMPANY,
 Debtor

Bky. No. 70-347
 Order No. 2594

THE CLEVELAND AND PITTSBURGH
 RAILROAD COMPANY,
 Secondary Debtor

In Proceedings for the Reorganization of a Railroad
 Bky. No. 70-347-D

Order No. 81
MEMORANDUM AND ORDER

FULLAM, J. October 13, 1976

The Trustees of the Penn Central and of the Cleveland and Pittsburgh Railroad Company have jointly petitioned for approval of a proposed sale of certain real estate in Cleveland, Ohio, to K & S Parking Company, Inc. (Document No. 11174, PCTC).

A portion of the property is leased to C-K Properties, Inc. for commercial parking facilities. Originally, the Trustees (through their representative, the Penn Central Properties Division of Victor Palmieri & Company, Incorporated,) negotiated a sale of the tract to C-K Properties, Inc. for \$273,000. Before this trans-

action had received the final approval of the Trustees (and, of course, before approval of this Court was sought), it was learned that K & S Parking Company, Inc. would be interested in paying a higher price for the property.

Thereupon, the Trustees' representatives invited both prospective purchasers to submit sealed bids. But in view of the previous negotiations with C-K Properties, it was announced that the K & S bid would be opened first; if that did not exceed the original offer of C-K, C-K's sealed bid might be withdrawn, and the property would be sold at the original price. If the K & S bid exceeded the original offer by C-K, C-K's sealed bid would be opened, and the property would be sold to the higher bidder. This procedure was carried out. The K & S bid of \$351,110 exceeded C-K's original offer by more than \$76,000, and exceeded C-K's sealed bid by approximately \$37,000.

At the hearing in this Court, C-K objected to the proposed sale, asserting that, at the time the sealed bids were opened, it became apparent that the amount of C-K's original offer for the property was known by K & S. The Palmieri official handling the transaction denied any knowledge of such a "leak," but conceded that disclosure of this information to K & S may well have occurred.

Significantly, there has never been any assertion that the sealed bid procedure itself was in any way tainted. That is, there is no assertion that either bidder had any knowledge as to the amount of the other's bid. I fail to see how disclosure of the amount of the earlier offer (which, needless to say, was well known to C-K itself), assuming it occurred, gave K & S any unfair advantage.

More importantly, however, there is no assertion that C-K would, even now, be willing to equal or exceed the K & S bid. All that has been asserted is that, if the present petition is not approved, C-K would obtain further appraisals of the property, and, depending upon what they showed, might be willing to offer more than K & S's bid.

The Trustees' appraiser values the property at \$273,000. He testified that, even with knowledge of the bids, he could see no justification for increasing his appraisal. The proposed sale to K & S would therefore seem to be in the best interests of the Debtor's estate. I am not persuaded that the amount allocated to land value in connection with K & S's financing of proposed development of the property can be regarded as an appraisal of the present market value of the property.

The Petition will be granted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2521 and 77-2522.

In the Matter of:

PENN CENTRAL
TRANSPORTATION COMPANY,
Debtor.

SUTHERLAND MARINE COMPANY,
Appellant in No. 77-2521.

In the Matter of:

PENN CENTRAL
TRANSPORTATION COMPANY,
Debtor.

THE PITTSBURGH YOUNGSTOWN AND
ASHTABULA RAILWAY COMPANY,
Secondary Debtor.

SUTHERLAND MARINE COMPANY,
Appellant in No. 77-2522.

(D.C. No. B-70-347 In Bankruptcy, E.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
June 19, 1978

BEFORE SEITZ, *Chief Judge*, ALDISERT and
WEIS, *Circuit Judges*.

JUDGMENT ORDER

After consideration of all contentions raised by
appellants, it is

ADJUDGED AND ORDERED that the judgment
of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ COLLINS J. SEITZ
Chief Judge

Attest:

/s/ THOMAS F. QUINN
Clerk

Dated: Jun 21 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2521/2

In the Matter of:

PENN CENTRAL
TRANSPORTATION COMPANY,
Debtor

SUTHERLAND MARINE COMPANY,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS,
GIBBONS, ROSENN, WEIS, GARTH and
HIGGINBOTHAM, *Circuit Judges*.

The petition for rehearing filed by
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ SEITZ
Chief Judge

Dated: July 11, 1978